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No. 252

In the Supreme Court of the United States

OCTOBER TERM, 1943

J. HOWELL FLOURNOY, SHERIFF AND EX-OFFICIO TAX COLLECTOR, APPELLANT

v.

SAMUEL G. WIENER, WILLIAM B. WIENER, AND JACQUES L. WIENER

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INDEX

Argument: Page

I. The Court should not accept jurisdiction of this case or pass upon the constitutionality of Section 402 (b) of the Revenue Act of 1942 in this proceeding 2

A. Introductory 2

B. The appeal should be dismissed 10

II. Section 402 (b) of the Revenue Act of 1942 is constitutional 18

Conclusion 47

Appendix 49

CITATIONS

Cases:

Adams v. *Golson*, 187 La. 363 37

Allen v. *Henggeler*, 32 F. 2d 69, certiorari denied, 280 U. S. 594 39

Baldwin, Estate of, 50 Ariz. 265 35

Bauer v. *Albers*, 187 La. 496 34

Beals v. *Fontenot*, 111 F. 2d 956 23

Bender v. *Pfaff*, 282 U. S. 127 3, 24, 28, 32, 33, 36, 43

Blair v. *Roth*, 22 F. 2d 932, certiorari denied, 277 U. S. 588 23

Billings v. *United States*, 232 U. S. 261 45

Broad River Co. v. *So. Carolina*, 281 U. S. 537 45

Brock v. *Commissioner*, 16 B. T. A. 1358 39

Brodley v. *McCaughn*, 280 U. S. 124 45

Brown v. *State*, 323 Mo. 138 5

Burford v. *Sun Oil Co.*, 319 U. S. 315 17

Carile v. *Trotot*, 105 U. S. 751 33

Carmichael v. *Southern Coal Co.*, 301 U. S. 495 14

Champion Lumber Co. v. *Fisher*, 227 U. S. 445 10

Chase Nat. Bank v. *United States*, 278 U. S. 327 30

Coffee, Estate of, 19 Cal. (2d) 248 24

Commercial Bank of Cincinnati v. *Buckingham's Executors*, 5 How. 316 15

Commonwealth v. *Davis' Estate*, 345 Pa. 284 12

Cotton, Succession of, 172 La. 819 1

Cousin v. *St. Tammany Bank & Trust Co.*, 146 La. 393 34

Crooks v. *Harrelson*, 282 U. S. 55 45

Crown Cork Co. v. *Gutmann Co.*, 304 U. S. 459 11

Curtiss, Succession of, 10 La. Ann. 662 34

Darrenberger v. *Haupt*, 10 Nev. 43 42

Davis v. *Compton*, 13 La. Ann. 396 37

Cases—Continued. Page

Davock v. *Darcy*, 6 Robinson 342 ... 2
De Lappe v. *Commissioner*, 113 F. 2d 48 ... 3, 11
Detroit Bank v. *United States*, 317 U. S. 329 ... 20, 21
Devlin v. *Commissioner*, 82 F. 2d 731 ... 28
Dimock v. *Corwin*, 306 U. S. 363, 372 ... 41
Eawards v. *Ricks*, 30 La. Ann. 926 ... 34
First Nat. Bank of Abbeville v. *Broussard*, 202 La. 315 ... 34
Florida v. *Mellon*, 273 U. S. 12 ... 45, 47
Fox Film Corp. v. *Muller*, 296 U. S. 207 ... 15
Frierson v. *Frierson*, 164 La. 687 ... 33, 35
Gastauer v. *Gastauer*, 131 La. 1 ... 9
Gulix v. *Welch*, 80 F. 2d 165, certiorari denied, 297 U. S. 722 ... 24
Glenn v. *Elam*, 3 La. Ann. 611 ... 35
Gosserand v. *Monteleone*, 159 La. 316 ... 36
Great Lakes Co. v. *Huffman*, 319 U. S. 293 ... 17
Green v. *W. G. Ragley Lumber Co.*, 154 La. 965 ... 12
Greenwood v. *Commissioner*, 124 F. 2d 945 ... 35
Grolemund v. *Caffezata*, 17 Cal. (2d) 679, certiorari denied, 314 U. S. 612 ... 24
Guice v. *Lawrence*, 2 La. Ann. 226 ... 23
Gully v. *First Nat. Bank*, 299 U. S. 109 ... 13
Guillot v. *Guillot*, 141 La. 86 ... 34
Gunning v. *Cooley*, 281 U. S. 90 ... 11
Hagood v. *Doughton*, 195 N. C. 811 ... 5
Hawley v. *Crescent City Bank*, 26 La. Ann. 230 ... 34
Head Money Cases, 112 U. S. 580 ... 45
Heald v. *District of Columbia*, 259 U. S. 114 ... 43
Helvering v. *Bowers*, 303 U. S. 618 ... 41
Helvering v. *City Bank Co.*, 296 U. S. 85 ... 30
Helvering v. *Grinnell*, 294 U. S. 153 ... 30
Helvering v. *Hallock*, 309 U. S. 106 ... 30
Helvering v. *Hutchings*, 312 U. S. 393 ... 11
Henning v. *Anderson*, 121 Wash. 53 ... 36
Hernandez v. *Becker*, 54 F. 2d 542 ... 42
Highfield v. *Del. Trust Co.*, 34 Del. 306 ... 5, 12
Hirsch v. *United States*, 62 F. 2d 128, certiorari denied, 289 U. S. 735 ... 23, 24
Hooper v. *Tax Commission*, 284 U. S. 206 ... 9, 29
Holmes, D. H., Co. v. *Morris*, 188 La. 431 ... 36
Hottinguer v. *Hanau*, 300 U. S. 14 ... 15
Howard v. *United States*, 125 F. 2d 986 ... 34
Jeansonne v. *Jeansonne*, 187 La. 939 ... 8
Johnson, Succession of, decided May 11, 1942 ... 34
Jones v. *Jones*, 119 La. 677 ... 32
Justices, In re Opinion of, 85 N. H. 572 ... 5
Kelly v. *Kelly*, 131 La. 1024 ... 33, 34
Kelly v. *Robertson*, 10 La. Ann. 302 ... 35

Cases—Continued.

	Page
Keeley, W. G., Succession of, 18 La. Ann. 583	34
Knowles's Estate, In re, 295 Pa. 571	5
Knowlton v. Moore, 178 U. S. 41	4, 43
Kohn v. Groll, 118 Wash. 285	36
Lake v. Bender, 18 Nev. 361	48
Lang v. United States, 304 U. S. 264	44
Levenson, In re, 1 F. 2d 851, certiorari denied, *sub nom. Greene v. Booth*, 267 U. S. 598	39
Louisville & Nash. R. Co. v. West Un. Tel. Co., 237 U. S. 300	14
Luthy v. Philip Werlein Co., 163 La. 752	37
Lynch v. New York, 293 U. S. 52	15
McCoy v. Shaw, 277 U. S. 302	15
McDonald v. Lambert, 43 N. M. 27	35
Marks v. Lowenburg, 143 La. 196	34
Marshall v. Mullen, 3 Robinson 328	34
Matulich v. Crockett, decided November 28, 1938	37
May, Succession of, 120 La. 692	4
Miller's Executors v. Swann, 150 U. S. 132	14
Milliken v. United States, 283 U. S. 15	31
Minnesota v. National Tea Co., 309 U. S. 551	11
Moffitt v. Kelly, 218 U. S. 400	39
Murchison v. N. Y. ex rel. Tipaldo, 298 U. S. 587	11
Morgan v. Commissioner, 309 U. S. 78, 626	31,
Murchison v. Murchison, 136 La. 753	36
New York Trust Co. v. Eisner, 256 U. S. 345	6, 44
Nobbs v. Coolidge, 274 U. S. 531	10
Nyberg, Administrator v. United States, 66 C. Cls. 153, certiorari denied, 278 U. S. 646	39
Reader v. Commissioner, 60 F. 2d 866	23
Phillips v. Phillips, 160 La. 843	24, 54
Poe v. Seaborn, 282 U. S. 101	28, 36, 45, 46
Porter v. Commissioner, 288 U. S. 436	30
Prendergast v. Cassidy, 8 La. Ann. 96	36
Ramsey v. Beck, 151 La. 190	3
Reynolds v. Northern Trust Co., 278 U. S. 339	50
Richardson Mach. Co. v. Scott, 276 U. S. 128	15
Riggs v. Del Drago, 317 U. S. 95	20, 22
Rogers v. Helvering, No. 66, this Term, decided December 6, 1943	30
Scanlan v. Warwick, 16 La. Ann. 30	36
Schultz v. Iron, 23 Wall. 331	4
Schramm v. Steele, 97 Wash. 309	36
Scott v. Smith, 186 Wash. 447	35
Sears, In re Estate of, 119 Neb. 314	39
Shuster v. Shuster, decided March 24, 1943	37
Speckels v. Speckels, 116 Cal. 339	24
Stahl v. Succession of Brewer, 190 La. 810	4

Cases—Continued

State v. *Wiess*, decided June 23, 1943
State ex rel. Van Voss v. *Sutters*, 180 Wash. 269
State Tax Comm'n v. *Van Cott*, 306 U. S. 511
Stauffer, Succession of, 119 La. 66
Stewart v. *Stewart*, 199 Cal. 318
Talcott v. *United States*, 23 F. 2d 897, certiorari denied, 277 U. S. 604
Thalmann, Matter of, 177 Misc. 1055
Theas v. *Smith*, decided March 8, 1939
Third Nat. Bank & Trust Co. v. *White*, 287 U. S. 577
Thompson v. *Vance*, 110 La. 26
Title Insurance & Trust Co. v. *Goodsell*, 60 F. 2d 803, certiorari denied, 288 U. S. 613
Tomme v. *Tomme*, 174 La. 123
Tyler v. *United States*, 281 U. S. 497 25, 29, 30, 31, 37, 38, 39, 40
United States v. *Goodyear*, 99 F. 2d 523 24, 35, 44
United States v. *Jacobs*, 306 U. S. 363 29, 30, 37, 38, 39, 40
United States v. *Malcolm*, 282 U. S. 792
United States v. *Pelgram*, 81 F. 2d 606
United States v. *Robbins*, 269 U. S. 315
Virginian Ry. v. *Federation*, 300 U. S. 515
Watkins, Estate of, 16 Cal. 2d 793
Welch v. *Sampson*, decided October 29, 1943, affirming, *per curiam*, 40 F. Supp. 1014
Whitney v. *Tax Commission*, 309 U. S. 530
Wilson v. *Henderson*, decided June 28, 1939

Constitution and United States Statutes:

Constitution of the United States:
Article I, Section 8 8, 29, 47, 48
Fifth Amendment 8, 10, 12, 27, 44
Fourteenth Amendment
Internal Revenue Code:
Sec. 22, 26 U. S. C., Sec. 22
Sec. 811, 26 U. S. C., Sec. 811 1, 18, 20, 48
Sec. 822, 26 U. S. C., Sec. 822
Sec. 826, 26 U. S. C., Sec. 826 21, 22
Sec. 827, 26 U. S. C., Sec. 827 20, 21
Sec. 900, 26 U. S. C., Sec. 900
Judicial Code, Sec. 237 10, 11, 47
Revenue Act of 1926, c. 27, 44 Stat. 9
Sec. 301
Sec. 302
Revenue Act of 1942, c. 619, 56 Stat. 798
Sec. 402, 26 U. S. C., Supp. II, Sec. 811 2, 4, 6, 11, 18, 19, 48
Sec. 404, 26 U. S. C., Supp. II, Sec. 811
Sec. 411, 26 U. S. C., Supp. II, Sec. 827
Sec. 453, 26 U. S. C., Supp. II, Sec. 1090

Constitution and United States Statutes—Continued Page
Revised Statutes 3207 (Internal Revenue Code, Section
3678) 21
State Statutes:
Arizona Code (Howell):
Chapter XXVII 47
California Civil Code 1929:
Sec. 164a 24
Sec. 172a 24
Sec. 1401 28
Louisiana Civil Code Decenn. 1941:
Sec. 158 35
Sec. 159 35
Sec. 160 35
Idaho:
Act of June 4, 1864 47
Act of January 9, 1867 47
Louisiana Civil Code Part. 1932
Art. 915 31
Art. 1749 34
Art. 2332 32
Art. 2333 23 31 32
Art. 2363 23 33
Art. 2370 33
Art. 2372 33
Art. 2384 23 34
Art. 2384 23 34
Art. 2385 23 34
Art. 2386 23 34
Art. 2387 23 34
Art. 2388 23
Art. 2389 23
Art. 2390 23
Art. 2391 23
Art. 2392 31 32
Art. 2398 34 35
Art. 2402 23 35
Art. 2403 35 35
Art. 2404 23 34 36 36
Art. 2406 32 36
Art. 2408 36 37
Art. 2409 32 37
Art. 2410 32 38
Art. 2411 32 38
Art. 2412 32 38
Art. 2413 32 38
Art. 2425 32 38
Art. 2427 39

State Statutes—Continued.

Louisiana Code of Practice (Dart): Page

Art. 996.65 ... 4 59
Art. 996.66 ... 60
Art. 996.67 ... 61
Art. 996.68 ... 61
Art. 996.69 ... 62
Art. 996.70 ... 3 62
Art. 996.71 ... 63
Art. 996.72 ... 64
Art. 996.73 ... 64
Art. 996.74 ... 64
Art. 996.75 ... 65
Art. 996.78 ... 66
Art. 996.79 ... 66
Art. 996.82 ... 67
Art. 996.87 ... 67
Art. 996.88 ... 67
Art. 996.89 ... 4 68
Art. 996.90 ... 4 6 68
Art. 996.91 ... 4 68
Art. 996.92 ... 4 68
Art. 996.93 ... 4 69
Art. 996.94 ... 4 69
Art. 996.95 ... 69

New Compiled Laws of Nevada (1929):
Sec. 3364 ... 42
Sec. 2365 ... 42

Statutes of Nevada, 1864–1865, p. 239 ... 47 48

Statutes of Nevada (1873), Act of March 10, 1873, Sec. 10 ... 42

Statutes of Nevada (1935), c. 110, Act of March 27, 1935 ... 42

Statutes of Nevada (1937), c. 197, Act of March 26, 1937 ... 42

New Mexico Statutes Annotated (1941):
Sec. 31-108 ... 42
Sec. 31-109 ... 42

Remington's Revised Statutes of Washington (1932):
Sec. 6894 ... 35

Miscellaneous:

Community Property Income, Subcommittee of the Committee on Ways and Means, House of Representatives, 73d Cong., 2d Sess., on H. R. 8396, pp. 15-22 ... 10

Einstein, *Powers of Appointment and Estate Taxes*, 11, 52 Yale L. J. 494, 551 (1943) ... 11

H. Rep. No. 2333, 77th Cong., 2d Sess., p. 35 ... 10

Hubert, Leon D., Jr., *Effect of Recent Acts on the Incapacities and Disabilities of Married Women in Louisiana*, 8 Tulane Law Review 106 ... 36

McKay, *Community Property* (Second Ed.), Section 802 ... 35

S. Rep. No. 1631, 77th Cong., 2d Sess., p. 231 ... 19 20

III Vernier, *American Family Laws* (1935), Section 178 ... 35 11

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SAMUEL G. WIENER, WILLIAM B. WIENER, AND JACQUES L. WIENER

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

The United States presents this brief as *amicus curiae* because it is vitally interested in the question which the parties seek to raise, namely, whether Section 402 (b) of the Revenue Act of 1942, amending Section 811 (e) of the Internal Revenue Code, is constitutional, and believes the question should be litigated only in a controversy directly involving federal estate taxes. We think that the question should not have been passed upon in this proceeding involving a Louisiana tax, that this Court has no jurisdiction, under Section

237 (a) of the Judicial Code, to consider the issue upon appeal, and that the record does not present a federal question which could support a writ of certiorari under Section 237 (b), with respect to the issue raised by the appeal which has been allowed.

ARGUMENT

I

The Court Should Not Accept Jurisdiction of This Case or Pass Upon the Constitutionality of Section 402 (b) of the Revenue Act of 1942 in this Proceeding

A. Introductory

Sam Wiener, Jr. died in Shreveport, Louisiana on December 10, 1942. At the time of death, he and his wife held interests in community property which apparently had been acquired through the husband's earnings during the marriage.[1] Upon

[1] The evidence as to the origin of the community property is not entirely satisfactory, the record showing merely that all of the assets standing in the name of the decedent consisted of community property acquired during the marriage and that all of the decedent's estate consisted of such community property (R. 10-12). Both of the parties have assumed, as in the typical case, that all of the community property was acquired with the decedent-husband's earnings (Appellant's Br. 10; Appellees' Br. 7), and the United States as *amicus curiæ* takes the case as it finds it. As a practical matter there can be no real doubt that all the property was so acquired. The appellees have never contended that any part of the community property is excluded from the decedent's gross estate by the express terms of Section 402 (b) of the Revenue Act of 1942, as would

his death, under Louisiana law, one-half of the net community property remaining after the payments of debts and charges belonged to the surviving wife. The remaining one-half was subject to the decedent's testamentary disposition and under his will went to three of his sons.[2] These sons, referred to in Louisiana as the universal legatees and heirs, are the appellees here. (R. 10–11.)

The State of Louisiana has imposed not a single death duty, but two such taxes. The universal legatees and heirs of the decedent, proceeding under Section 7 of Act No. 127, Louisiana Acts (1921, Extra Session), p. 323, as amended by Section 1 of Act No. 44, Louisiana Acts (1922), p. 80 (Louisiana Code of Practice, Art. 996.70, Appendix, *infra*), asked only for a determination of the amount of *inheritance* taxes due the State under that statute on their father's half-interest in community property which was bequeathed to them under the terms of his will. (R. 6–7, 19.) The tax

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any part traceable to the surviving wife's earnings or separate property; nor have they contended that any part should be excluded under the terms of the federal statute as incorporated into the Louisiana inheritance or estate tax laws.

[2] It is well settled that upon the death of one of the spouses title to one-half of the Louisiana community property vests in the decedent's heirs or legatees and title to the other half remains in the surviving spouse where it was already vested, subject in both cases to the payment of community debts. *Ramsey* v. *Beck*, 151 La. 190; *Jeanfreau* v. *Jeanfreau*, 187 La. 939. See also *Bender* v. *Pfaff*, 282 U. S. 127, and *De Lappe* v. *Commissioner*, 113 F. 2d 48 (C. C. A. 5th).

imposed by Act No. 127 is upon all inheritances, legacies, and donations and gifts made in contemplation of death to the extent not specifically exempted by the act and the rates are prescribed in the act. Section 2 of Act No. 127 (Louisiana Code of Practice, Art. 996.65, Appendix, *infra*). It is a tax upon the privilege of receiving property by will, or by inheritance and is payable by the heirs, legatees and donees with respect to property which they thus acquire. *Succession of Cotton*, 172 La. 819; *Succession of Stauffer*, 139 La. 66; *Succession of May*, 120 La. 692; *State* v. *Succession of Brewer*, 190 La. 810. See also *Scholey* v. *Rew*, 23 Wall. 331; *Knowlton* v. *Moore*, 178 U. S. 41. This taxing statute makes no mention of the federal estate tax law or of Section 402 (b) of the Revenue Act of 1942 and is not affected in any way by that provision.

A second death duty was imposed by Act No. 119 of Louisiana Acts (1932), p. 415 (Louisiana Code of Practice, Art. 996.89–996.94, Appendix, *infra*). Section 1 of that Act (Louisiana Code of Practice, Art. 996.89) provides that "in addition to the inheritance tax as now provided by Act No. 127 of 1921, as amended by Act 44 of 1922," there shall be levied "an estate transfer tax upon all estates which are subject to taxation under the Federal Revenue Act of 1926." Section 2 (*ibid.*, Art. 996.90) prescribes the measure of the tax by providing that whenever the aggregate amount of all inheritance, succession, legacy, and estate

taxes actually paid to the several states of the United States in respect to any property owned by the decedent shall be less than 80% of the estate tax payable to the United States under the provisions of the Revenue Act of 1926, the difference between that amount and 80% shall be paid to Louisiana." The declared purpose of the legislature in enacting this statute was to secure for the state the benefit of the credit allowed under Section 301 (b) of the Revenue Act of 1926 by imposing additional taxes. Section 4 of the Act (Art. 996.92, Louisiana Code of Practice, Appendix, *infra*).

The heirs and universal legatees had ruled the tax collector to fix the amount of "inheritance tax due to the State of Louisiana" but made no reference to the "estate transfer tax" imposed by Act No. 119 even if they might have done so by virtue of Section 3 of that Act (Louisiana Code of Practice, Art. 996.91, Appendix, *infra*), providing that "in so far as applicable" the provisions of Act No. 127, as amended, should regulate the

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It is generally held that such a tax is not an inheritance but an estate tax, which, similarly to the federal estate tax (*New York Trust Co.* v. *Eisner*, 256 U. S. 345), is imposed upon the estate of a decedent in respect of his privilege of transmitting the estate at his death. See *Haggod* v. *Doughton*, 195 N. C. 811; *Brown* v. *State*, 323 Mo. 138; *Highfield* v. *Del. Trust Co.*, 34 Del. 306; *In re Knowles's Estate*, 295 Pa. 571; *Commonwealth* v. *Davis' Estate*, 345 Pa. 284; *Matter of Thalmann*, 177 Misc. 1055. See also *In re Opinion of Justices*, 85 N. H. 572. Cf. *State* v. *Wiess* (S. Ct. Texas), decided June 23, 1943 (171 S. W. 2d 848).

proceedings for the determination and collection of the tax imposed by Act No. 119. It appears, however, that in answering the rule to determine the inheritance tax imposed under Act No. 127, the tax collector claimed that the appellees as their father's heirs owed an inheritance tax measured by the entire community estate of the decedent and their mother, rather than by the one-half of such estate which they had inherited from the decedent (R. 8, 19). The tax collector assigned as a reason therefor that in Section 402 (b) of the Revenue Act of 1942 (Appendix, *infra*) Congress had required that there be included in the decedent's estate for federal estate tax purposes the entire community interest of the decedent and his wife at the time of his death and that the Louisiana Legislature had in Section 2 of Act No. 119 (Louisiana Code of Practice, Art. 996.90) provided that the state *inheritance* tax (imposed by Section 2 of Act No. 127) should be at least 80% of the estate tax payable to the United States. He asked that upon the determination of the net value of the estate, there be a judgment for the state in an amount equal to 80% of the tax due the Federal Government under the basic federal estate tax act.[1] Revenue Act of 1926, c. 27, 44 Stat. 9.

[1] The estimated federal estate tax was computed under the Revenue Act of 1926 on the basis of a net estate of $808,272.46, a valuation arrived at by deducting from the community estate all debts and charges including the fed-

The appellees then interposed a plea challenging the constitutionality of Section 402 (b) of the Revenue Act of 1942 (R. 9–10). An agreed statement of facts was filed (R. 10–12) in which it was set forth that the net value of the entire community after payment of debts, succession charges and *taxes*, state and federal, was $608,272.46 (R. 11). It was agreed that if the collector's position were sustained, the heirs would owe an inheritance tax of $14,330.90, and that if the heirs were sustained, they owed $8,224.09 (R. 12). It was further agreed that if the federal officials should increase the valuation of the estate or decrease the deductible indebtedness, the state might secure an additional judgment (R. 12). And it was stipulated that in computing the net estate a tentative federal tax had been deducted, since the heirs contended that the tax should be deducted in computing the inheritance tax, but that the collector retained the right to contest the issue in subsequent proceedings (R. 12).

The Louisiana District Court held that so much of the Revenue Act of 1942 as seeks to subject to the federal estate tax, and consequently makes subject to the state inheritance tax under Act No.

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eral tax and state tax (R. 11-12). Allowing an exemption of $100,000, the federal estate tax on a net estate of $608,272.46 would be $17,913.62. See Section 301 of the Revenue Act of 1926. The sum of $14,330.90 which the collector determined as the inheritance tax due is 80% of $17,913.62.

119, as amended, property in which the surviving wife had a vested and present interest prior to her husband's death violated the uniformity clause of Article I, Section 8 of the Constitution and the due process clause of the Fifth Amendment (Appendix, *infra*). It concluded that the inheritance tax due by the heirs and legatees, who were plaintiffs under the rule, might be based only on one-half of the community property owned by the decedent at and prior to his death which was transmitted to his heirs, and gave judgment to the collector for $8,224.09. There was reserved to the state collector the right in further and supplemental proceedings to avail himself of the reservation contained in the agreed statement of facts. (R. 13–14.) Evidently the trial court assumed that Act No. 119 imposed an inheritance tax which served merely to increase the inheritance tax imposed by Section 2 of Act No. 127 and that the tax thus increased was imposed on the universal legatees and heirs.

After the case was appealed to the Supreme Court of Louisiana, the Attorney General of the United States was notified by the court that the issue of the validity of a provision of the Revenue Act of 1942 had been drawn into question in the case (R. 16–17) and a brief as *amicus curiae* was filed in behalf of the Government. After the argument of the case, the universal legatees and heirs filed an amended plea of unconstitutionality

in which it was claimed not only that Section 402 (b) was invalid, but also that if the state statute, either alone or in conjunction with the federal statute, were construed as imposing an inheritance tax based upon or measured by the entire community estate, the statute would be violative of the due-process clause of the Fourteenth Amendment (R. 17–18). It was asserted in the plea that the issue was raised for the reason that the Attorney General had contended that the only tax liability involved was that imposed by the state and that the validity of the federal law was not in issue. The tax collector agreed to the consideration of the amended plea. (R. 18.)

The court below held that since the wife has a vested interest in one-half of the community property, the construction placed by the tax collector upon Act No. 119, namely, that in arriving at the amount of inheritance taxes due by the plaintiffs there should be included in the measure of the tax not only the half-interest in the community property willed to them by their father but also the half-interest belonging to their mother, would violate the due-process clause of the Fourteenth Amendment of the Constitution of the United States (citing *Hooper* v. *Tax Commission*, 284 U. S. 206) (R. 22). It was not content, however, to stop there, but held further that since the limitation placed upon the states by the Fourteenth Amendment is likewise placed on the Federal Gov-

ernment by the Fifth Amendment (citing *Nichols v. Coolidge*, 274 U. S. 531) (R. 23). Section 402 (b) of the 1942 Act was invalid. The judgment of the lower court was affirmed (R. 30) and a petition for rehearing was denied July 13, 1943 (R. 30–31). The order of the Chief Justice of the Supreme Court of Louisiana allowing the appeal states that the validity of Section 402 (b) of the Revenue Act of 1942 was drawn into question in the case and that the decision was against its validity (R. 33).

B. THE APPEAL SHOULD BE DISMISSED

The state tax collector invokes the appellate jurisdiction of this Court solely on the ground that the court below has held Section 402 (b) of the Revenue Act of 1942 invalid, under the Fifth Amendment, and that the result of its decision is to deny effect to that section in the computation of the basic federal estate tax and consequently in the computation of the inheritance tax due Louisiana, which under the state law is required to be 80% of the basic federal estate tax. (R. 32, 33.) Under Section 237 (a) of the Judicial Code, as amended, the Court has jurisdiction to review the final judgment of the highest court of a state when there "is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity." The phrase "drawn in question" means brought forward and made the ground of decision. *Champion Lumber*

Co. v. *Fisher*, 227 U. S. 445; *Minnesota* v. *National Tea Co.*, 309 U. S. 551. By force of Section 237 (c), the appeal papers may be treated as a petition for certiorari under Section 237 (b). The latter subsection will support review by certiorari where a state statute has been held invalid under the Fourteenth Amendment. It would appear, however, that this subsection is of no avail in the instant case, since the appeal papers make no claim that the decision of the court below is grounded upon a holding that the state statute is invalid under the Fourteenth Amendment. It is settled that review on certiorari is limited to questions presented by the petition for the writ. *Crown Cork Co.* v. *Gutmann Co.*, 304 U. S. 159; *Morehead* v. *N. Y. ex rel. Tipaldo*, 298 U. S. 587; *Helvering* v. *Hutchings*, 312 U. S. 393; *Gunning* v. *Cooley*, 281 U. S. 90. The question, therefore, is whether the court below rested its decision on the invalidity of the federal statute, so that the appeal will lie under Section 237 (a). The matter is not free from doubt, but we believe that the court did not do so and that the appeal cannot be maintained.

1. There is an initial question as to the precise issue which the court below decided with respect to the state law. As will be seen from the foregoing statement (*supra*, pp. 3, 5–6), the issue raised by the pleadings was apparently whether the universal legatees and heirs could be required to pay

an inheritance tax on the one-half of the community property which went to the widow, without regard to whether the widow herself might have been required to pay an inheritance tax on the share taken by her or whether a Louisiana estate tax might include the widow's share within the decedent's estate for tax purposes. This question, if pressed and decided, might have been resolved either on a construction of the Louisiana statute alone,[*] or under the Fourteenth Amendment. It is not clear, however, that this question was in the case as presented, for the reason that the universal legatees and heirs stipulated, referring to the basic federal estate tax, that they "do not contest their legal liability for eighty per cent of such tax as may be lawfully due" (R. 11). At some places in the opinion the court seems to consider only the question whether the universal legatees and heirs could be taxed on property which they did not receive (R. 20, 21, 29–30). Elsewhere the court appears to decide the case on

[*] Act No. 127 had been construed as not imposing an inheritance tax on the interest of the surviving wife since she does not take her interest by inheritance from her husband. See *Grace* v. *W. G. Bagley Lumber Co.*, 154 La. 965. Two courts have concluded that not all property included in the measure of the federal tax is to be included in the measure of the state "take-up" tax. See *Highfield* v. *Del. Trust Co.*, 34 Del. 306, and *Commonwealth* v. *Dietz's Estate*, 345 Pa. 284, holding that property included within the gross estate of a donee by virtue of his exercise of a general power of appointment is not to be included within the measure of the state tax.

the broader proposition that the Fourteenth Amendment precludes a state from imposing an estate or inheritance tax with respect to the share of community property belonging to the surviving spouse (R. 13, 21–22, 23–29). If the first theory of the court's decision is correct—that is, if the decision below is limited simply to the point that the universal legatees and heirs could not be taxed on the share of the community property which went to the widow—then very clearly the case did not turn on any question involving the federal statute under the Fifth Amendment. The federal tax is an *estate* tax, payable from the whole estate, and does not impose any burden on the appellees with respect to property they do not receive. (*Infra*, pp. 20–21.) But if the view is correct that the broader question was decided, we nevertheless believe that decision did not turn on the validity of the federal statute under the Fifth Amendment.

2. The case involves not federal but state taxes. The ultimate question at issue, the amount of the liability, was settled by the court's holding that if the state statute were construed so as to include the widow's share within the measure of the state inheritance or estate tax, the statute was invalid under the Fourteenth Amendment (R. 22, 29–30). This holding raised no question under the Fifth Amendment.[1] The court did not hold that the state

[1] It seems clear that the question as to the validity of the state statute, under the Fourteenth Amendment, if construed as the tax collector construed it, is not so related

statute was dependent for its operation on the federal statute, so that, as a matter of construing the state law, the case turned on the validity of the federal act under the Fifth Amendment. Rather, the court took as its starting point simply the construction of the state statute tendered by the tax collector (R. 21), and its decision that this construction ran counter to the Fourteenth Amendment disposed of the case. It is true, of course, that the state tax collector was impelled to contend for the construction of the state statute advanced by him because of the enactment of Section 402 (b) of the Revenue Act of 1942. But the fact that the enactment of the federal statute provided the motive for the tax collector in arguing for this particular construction did not make the federal law the basis of decision. As pointed out by Mr. Justice Cardozo in *Gully v. First Nat. Bank*, 299 U. S. 109, 115: "Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit."

3. Having held that the state statute as construed by the tax collector was invalid under the Fourteenth Amendment, the court then considered

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to the question of the validity of Section 402 (b) of the Revenue Act of 1942 as to require that the validity of both be determined in the same proceeding. Cf. *State Tax Comm'n v. Van Cott*, 306 U. S. 511.

Even if the court had adopted this approach, it is probable that an appeal could not be maintained. See *Miller's Executors v. Swann*, 150 U. S. 132; *Louisville & Nash. R. Co. v. West. Un. Tel. Co.*, 237 U. S. 300. Cf. *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 507.

Section 402 (b) of the Revenue Act of 1942 and declared that it was invalid under the Fifth Amendment (R. 23, 25). But at this point the case had already been decided. Accordingly, the case was disposed of before the only federal question raised on this appeal was reached. The state court in effect held that Section 402 (b) of the Revenue Act of 1942 was not to be incorporated by reference into the state law and whether or not that section was invalid then became immaterial. The decisive fact would seem to be that the appellant, in his appeal to this Court, raises no issue other than the validity of Section 402 (b) under the Fifth Amendment, and that the decision below rests on an independent ground, namely the asserted invalidity of the Louisiana statute under the Fourteenth Amendment. See *Lynch* v. *New York*, 293 U. S. 52; *Broad River Co.* v. *So. Carolina*, 281 U. S. 537; *McCoy* v. *Shaw*, 277 U. S. 302; *Richardson Mach. Co.* v. *Scott*, 276 U. S. 128; *Fox Film Corp.* v. *Muller*, 296 U. S. 207.*

In addition, there are strong practical considerations which oppose review. The only tax that

* The statement of the Chief Justice of the Supreme Court of Louisiana in the order allowing the appeal that an issue as to the validity of Section 402 (b) of the Revenue Act of 1942 was drawn into question and the decision was against its validity must, in view of the opinion, be interpreted as meaning merely that the issue was raised and decided. In any event the statement is not controlling. See *Honeyman* v. *Hanan*, 300 U. S. 14; *Commercial Bank of Cincinnati* v. *Buckingham's Executors*, 5 How. 317.

will be directly affected by this Court's holding that Section 402 (b) of the Revenue Act of 1942 is valid or invalid is the federal estate tax. This is a tax not involved in the present proceeding. Questions as to the validity and application of this tax can be satisfactorily determined only in a proceeding for the collection of the federal tax where the Federal Government is a party, has a hand in shaping the record, and the court is exclusively concerned with the requirements of federal law. The instant case is a plain example of the confusion which is likely to result if the validity and application of federal tax laws are decided tangentially, in cases where the principal issue concerns the validity and application of state tax laws. The court below seems to have been influenced by the notion that the burden of any tax, whether state or federal, would have to be borne by the universal legatees and heirs (R. 20, 21, 29–30). The court seems to have failed to understand that the federal estate tax is collectible from the entire gross estate, including all of the community property which may be validly included within it (*infra*, pp. 20–21). Nor, whatever the view which the court below took of the case, was it necessary for it to consider the validity and application of the federal law prior to the determination of the amount of the federal estate tax

by the Bureau of Internal Revenue and, if necessary, by the federal courts.[9] Thus, considerations of public policy should have prevented the state court from deciding in this proceeding that the federal statute is invalid. Cf. *Great Lakes Co.* v. *Huffman*, 319 U. S. 293; *Burford* v. *Sun Oil Co.*, 319 U. S. 315. It is true that the state court has now decided that the federal statute is invalid. This, however, will not bind the Federal Government in any subsequent action to collect the federal estate tax from the decedent's estate.

For these reasons we believe that the instant appeal cannot be maintained under Section 237 (a) of the Judicial Code.

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[9] The decision of the validity of the federal statute here was unnecessary because of the ground on which the court based its decision. But even assuming that the court had considered that the operation of the state law was dependent upon the validity of the federal law, decision as to the validity and application of the federal estate tax could, and we submit should have been postponed until the determination of the federal tax due by the Bureau of Internal Revenue and the resolution of any controversy which might have then arisen through the normal channels. The precipitate action of the state court in deciding the validity of the federal statute has not, in fact, served to dispose even of the present controversy as to the total state tax liability. On the contrary, there has been merely a tentative computation of the state tax, the tax collector reserving the right to assert a further claim *after* the adjustment of certain items and on final determination of the federal tax (R. 12).

II

Section 402 (b) of the Revenue Act of 1942 is Constitutional

In the event that this Court should take the view that the constitutionality of Section 402 (b) of the Revenue Act of 1942 was necessarily drawn into question and decided in this proceeding, and that the Court has jurisdiction of the appeal, we submit that the validity of that section must be sustained.

Section 402 (b) of the Revenue Act of 1942 amended the title of Section 811 (e) of the Internal Revenue Code (Appendix, *infra*) so as to refer to community interests as well as joint interests, and added to the section subdivision (2) requiring the inclusion in the gross estate of the value of property:

> To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community prop-

erty as was subject to the decedent's power of testamentary disposition.

The avowed purpose of Congress in enacting this and certain other amendments[8] to the estate and gift tax law was to eliminate what it regarded as special tax privileges enjoyed by residents of community property states, and thus to establish an estate and gift tax system more nearly based on ability to pay.[9] Section 402 (b) rests on the

[8] See Sections 402 (a), 404 and 453 of the Act.

[9] H. Rep. No. 2333, 77th Cong., 2d Sess., p. 35; S. Rep. No. 1631, 77th Cong., 2d Sess., p. 231. The House Report gives tables showing the tax savings effected by spouses domiciled in the community property states. This matter has repeatedly been called to the attention of Congress. It was the subject of special inquiry at hearings entitled "Community Property Income," before a Subcommittee of the Committee on Ways and Means, House of Representatives, 73d Cong., 2d Sess., on H. R. 8396, held in May and June 1934. At these hearings L. H. Parker, then Chief of Staff of the Joint Committee on Internal Revenue Taxation, submitted a comprehensive memorandum, set out at pages 15-22, inclusive, of these hearings. Mr. Parker there made the following statement as regards the estate tax advantages of the husband and wife in community property states (p. 17):

"The husband and wife with substantial property in a community property State also enjoy a great advantage over married persons in other States in that there is no estate tax imposed on one half of the property of the husband acquired after marriage and passing to the wife.

"For instance, suppose we have a man, wife, and son living in a community property State. Assume the man has accumulated $2,000,000. On his death $1,000,000 passes to the wife without tax and there will be a tax of $117,500 on the $1,000,000 passing to the son. If the wife now dies, there will be a tax of $117,500 on her estate passing to the son. The total estate tax, then, on $2,000,000 passing eventually to the

premise that the alteration effected by the death of one spouse on the community interests of both furnishes an appropriate occasion for the imposition of a federal estate tax measured by the entire community estate, except to the extent that it was actually earned by the survivor or was traceable to income from his or her separate property. There is a qualification that the property subject to the decedent's testamentary power, normally one-half, is always includible.

The tax assessed on this basis is an obligation of the estate (Internal Revenue Code, Section 822), to "be paid out of the estate as a whole" (*Riggs* v. *Del Drago*, 317 U. S. 95, 97). By force of Section 827 (a) of the Internal Revenue Code, the tax becomes a lien upon all property includible in the "gross estate of decedent" (*Detroit Bank* v. *United States*, 317 U. S. 329, 332–333), and thus on the community property brought within the "gross estate" by Section 811 (e), as amended, including the share of the community property taken by the surviving spouse. Section

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son will be $235,000 in a community-property State. On the other hand, in a non-community-property State there will be an estate tax of $315,500 collected on the death of the husband. If the widow receives $1,000,000 of the estate and she dies after 5 years, leaving her property to the son, there will be a further tax of $117,500. Therefore, the total tax in a non-community-property State in such a case is $433,000 against $235,000 in a community-property State; that is, there is 84 percent more tax collected in the non-community-property State."

827 (b), as amended by Section 411 of the Revenue Act of 1942, explicitly provides that if the estate tax is not paid when due—

> then the spouse, * * * who receives, or has on the date of the decedent's death, property included in the gross estate under section 811 * * * (e) * * *, to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax.

Upon sale by the surviving spouse "to a bona fide purchaser for an adequate and full consideration in money or money's worth," such community property is "divested of the lien provided in section 827 (a)" but "a like lien" then attaches "to all the property of such spouse."[12]

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[12] In view of these provisions, appellees' contention (Br. 28–30; also see Br. 10–11, 27–28, 31–33; Brief of Brady et al. as *amici curiae*, 23, fn. 11) that the federal law requires the beneficiaries under the decedent-spouse's will to bear the weight of the entire estate tax is plainly erroneous. (1) The claim that the federal statutes provide no method of enforcing the lien on the surviving spouse's share (Appellee's Br. 28) overlooks R. S., 3207 (Internal Revenue Code, Section 3678). This was the section utilized to enforce the lien on the entirety property involved in the *Detroit Bank* case (317 U. S. at p. 331). As to enforcement of the personal liability of the surviving spouse, see Internal Revenue Code, Section 900. (2) The claim that the federal law requires that the surviving spouse be reimbursed for the part of the estate tax paid with respect to the property taken by him or her (Appellee's Br. 29) flies in the face of Section 827 (b), quoted above. The reimbursement provision of Section 826 (b) is in aid, rather than derogation, of Section 827 (b), for its purpose is simply to assure that, so far as the federal law is

All of the community property here involved is assumed to be attributable to the earnings of the decedent-husband. The heirs and legatees make no contention that Congress may not tax the one-half of the value of the community property over which the decedent had the power of testamentary disposition. The power of Congress in this respect has never been seriously challenged. (See *infra*, pp. 43–44.) The argument here is that the surviving wife has a vested half-interest in all community property, however acquired, and that to measure the husband's estate tax by that half, even though the community property owned at the time of death had its origin in the decedent-husband's earnings or income from his separate estate,[1] is to violate the Fifth Amendment to the Constitution.[2]

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concerned, all parts of the gross estate bear their proportionate burden. See *Riggs* v. *Del Drago*, 317 U. S. at pp. 100–101. The language of Section 826 (b)—"that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution"—is probably applicable literally to the community property interest of the surviving spouse in Louisiana, since his or her sole ownership right attaches only to one-half of the residue of the property remaining after the death of the other spouse. (*Infra*, pp. 32–33.) If the widow here can recover from the heirs and universal legatees any payment of the tax not in excess of her proportionate share, it is by virtue of their agreement to accept the succession and thus to become liable for the tax (R. 11) and not by virtue of Section 826 (b).

[1] In Louisiana the community property includes all property acquired by either spouse during marriage other than property acquired with separate funds or by inherit-

The Government does not deny that in Louisiana the wife has such a "vested interest,"[1] though it

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ance or by donation made to husband or wife particularly. It includes the profits and revenues derived from community property, the earnings of husband and wife (except earnings of the wife or profits of a business conducted by her while she is living separate and apart from her husband), and revenues and profits of the separate property of *both* spouses except those from the wife's paraphernal property where such property is administered by the wife separately. See Articles 2334, 2335, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2402 of Louisiana Civil Code, Annotated (Dart; 1932). The proceeds of the sale of separate property, however, are separate property. *Beals* v. *Fontenot*, 111 F. 2d 956 (C. C. A. 5th).

[1] The ephemeral character of such an interest should, however, be noted. That the term "vested interest" is lacking in substance as applied to community property, is well illustrated by the cases dealing with California law. The rights of the husband in California were originally considered to be such as to require the inclusion of all the income in his gross income for income tax purposes, on the theory that the wife did not have a vested one-half interest therein. See *United States* v. *Robbins*, 269 U. S. 315; *Blair* v. *Roth*, 22 F. 2d 932 (C. C. A. 9th), certiorari denied, 277 U. S. 588; *Pedder* v. *Commissioner*, 66 F. 2d 866 (C. C. A. 9th); *Hirsch* v. *United States*, 62 F. 2d 128 (C. C. A. 9th) certiorari denied, 289 U. S. 735; *United States* v. *Pettigrew*, 81 F. 2d 666 (C. C. A. 9th); *Poelin* v. *Commissioner*, 82 F. 2d 731 (C. C. A. 9th). For the same reason community property was included in the husband's gross estate under Section 302 (a) of the Revenue Act of 1926 or similar provisions of earlier acts. *Tyler* v. *United States*, 23 F. 2d 897 (C. C. A. 9th), certiorari denied, 277 U. S. 604; *Title Insurance & Trust Co.* v. *Gaydell*, 60 F. 2d 863 (C. C. A. 9th), certiorari denied, 288 U. S. 613. In 1917 and 1923, California made certain amendments to her Civil Code which enabled the wife to dispose of one-half of the community property by will and required that she join in any conveyance of com-

may be noted that the Louisiana courts have not always so held. See *Guice* v. *Lawrence*, 2 La. Ann. 226, which was overruled in *Phillips* v. *Phillips*, 160 La. 813, 826–827. See also *Bender* v. *Pfaff*, 282 U. S. 127.

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munity real estate. See Sections 172a and 1401 of the Civil Code of California (1929). It was nevertheless held that she had not acquired a vested interest in community property. *Stewart* v. *Stewart*, 199 Cal. 318; *Spreckels* v. *Spreckels*, 116 Cal. 339; *Hirsch* v. *United States*, *supra*; *Gillis* v. *Welch*, 80 F. 2d 165 (C. C. A. 9th), certiorari denied, 297 U. S. 722. It required only a simple statute, enacted July 29, 1927, declaring that her interest was a "present, existing and equal" interest (California Civil Code (1929), Section 161a) to change all this. See *United States* v. *Pettigrew*, *supra*. Thereafter this Court held that the husband was required to return only one-half of his earnings thereafter acquired (*United States* v. *Malcolm*, 282 U. S. 792) and the Circuit Court of Appeals for the Ninth Circuit held that only one-half of the value of community property acquired subsequent to July 29, 1927, was required to be included in the gross estate (*United States* v. *Goodyear*, 99 F. 2d 523; *Welch* v. *Sampson*, decided October 29, 1943, not yet reported, affirming, *per curiam*, 40 F. Supp. 1014 (S. D. Cal.)). Indeed, in the cases last cited the court held that where the husband and wife had agreed that community property acquired *prior* to the 1927 amendment should have the characteristics of property acquired thereafter, only one-half of such property was includible in the husband's gross estate. And this remarkable change in tax consequences has been achieved despite the refusal of the Supreme Court of California to rule that any change of substance has been effected by the 1927 amendment, or even to rule that the wife's interest is now to be termed a "vested" interest. See *Grolemund* v. *Caffarata*, 17 Cal. (2d) 679, certiorari denied, 314 U. S. 612; *Estate of Coffee*, 19 Cal. (2d) 248.

The question arising under the Fifth Amendment, therefore, is whether Congress has the power to assess a tax against a decedent-husband's estate measured by the full value, rather than only one-half of the value, of community property attributable to his earnings, notwithstanding the fact that prior to his death the surviving wife had a vested, undivided one-half interest therein. Stated otherwise, the question is whether such a tax levied by Congress is so arbitrary and unreasonable in the circumstances here existing as to require this Court to declare it null and void under the Fifth Amendment. The argument for appellees is grounded on the proposition that A may not be taxed on the property of B. But this general proposition is of little aid in deciding concrete cases. It is clear that there need be no technical passing of title from the decedent to the survivor in order to bring the property within the former's gross estate. The test instead is whether, notwithstanding that the surviving spouse had a "vested," undivided community interest, the rights of the spouses in the property were sufficiently altered by the death of the decedent to justify the imposition of the tax. The cases establish this test and, we submit, resolve the instant controversy by sustaining the statute.

The due process test. In *Tyler* v. *United States*, 281 U. S. 497, the question was whether Congress had the power to include within a decedent's

gross estate the full value of property held by him and his wife as tenants by the entirety (excluding that portion originally owned by the survivor above). *It was argued that an estate tax* based on inclusion in his estate of the value of property so held was one on property which the survivor had prior to the decedent's death and was therefore a direct tax on property and violative of Article I, Section 8, of the Constitution, requiring apportionment of direct taxes. It was argued, further, that the statute violated the due process clause of the Fifth Amendment. In answer the Court observed, respecting the nature of the Congressional power to levy estate taxes, that (p. 502):

> If the event is death and the result which is made the occasion of the tax is the bringing into being or the enlargement of property rights, and Congress chooses to treat the tax imposed upon that result as a death duty, even though, strictly, in the absence of an expression of the legislative will, it might not thus be denominated, there is nothing in the Constitution which stands in the way.

The issue presented by the case was then stated as follows (p. 503):

> The question here, then, is, not whether there has been, in the strict sense of that word, a "transfer" of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death

> has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights.

The answer was given in the following language (pp. 503–504):

> Before the death of the husband (to take the *Tyler* case, No. 428,) the wife had the right to possess and use the whole property, but so, also, had her husband; she could not dispose of the property except with her husband's concurrence; her rights were hedged about at all points by the equal rights of her husband. At his death, however, and because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will. Thus the death of one of the parties to the tenancy became the "generating source" of important and definite accessions to the property rights of the other. These circumstances, together with the fact, the existence of which the statute requires, that no part of the property originally had be-

> longed to the wife, are sufficient, in our opinion, to make valid the inclusion of the property in the gross estate which forms the primary base for the measurement of the tax. * * *

Accordingly, it was held that the inclusion of the full value of the tenancy by the entirety property in the decedent's estate violated neither the apportionment requirement nor the due process clause of the Fifth Amendment.

Thus, the power of Congress with respect to the permissible tax base for purposes of estate taxation is not limited to property "owned" by the decedent at the time of his death as to which there is a transfer in a technical sense. Upon the death of a holder by the entirety there is not technically, from the conveyancer's point of view, any transfer of title or of estate to the survivor, since the survivor throughout the tenure has been seized *per tout et non per mug.* Nevertheless, the Court held that the value of co-owned property might be included in the tax base for the reason that substantial rights and powers were transmitted to the survivor on the decedent's death.

This decision makes it clear, therefore, that the mere fact that the wife's interest is a vested interest during her husband's lifetime does not preclude Congress from imposing a tax on the total value of community property. *Poe* v. *Seaborn*, 282 U. S. 101, and *Bender* v. *Pfaff*, 282 U. S. 127, holding that the federal income tax laws in

pose income taxes according to ownership of income and hence, that the husband can not be taxed on the whole of such income, are clearly of no weight in determining the issue here. Those cases turned on the construction of the language of the taxing statutes imposing a tax on the net income "of every individual" (see Section 22 (a) of the Internal Revenue Code) and presented no question of Congressional power. Here, on the contrary, there is no question but that Congress intended to include the property involved in the measure of the estate tax and the sole question is whether the provision is constitutional. Likewise irrelevant is *Hooper* v. *Tax Commission*, 284 U. S. 206, to the effect that due process forbids taxing A on the income of B. That case dealt not with community or co-owned property, but with the separate property of the wife; under the law of Wisconsin the wife exercised the same rights of management and control with respect to her separate property as if she were single. But an estate tax may be levied against A's estate on the basis of the full value of co-owned property if substantial rights and powers respecting the whole property accrue to the survivor on A's death.

These principles were again vindicated in *United States* v. *Jacobs*, 306 U. S. 363. There, inclusion in the decedent's estate of the full value of property held in joint tenancy with his wife was sustained on the same reasoning as that employed in *Tyler* v. *United States*, *supra*. It

was pointed out that (p. 371) "There was—at his [the husband's] death—a distinct shifting of economic interest, a decided change for the survivor's benefit." The argument that the *Tyler* case was distinguishable because it involved a tenancy by the entirety and under such a tenancy the wife had no power to sever the tenancy by making a conveyance of her interest was rejected. The joint tenancy, moreover, had been created prior to the enactment of the federal estate tax law. An argument that the tax as applied to such a tenancy was retroactive and therefore violative of the Fifth Amendment was dismissed with the observation that the tax was on a shift of interests that took places after enactment of the taxing statute.

Earlier cases had decided that the Fifth Amendment does not bar the inclusion in the decedent's gross estate of the value of property which the decedent has ceased to own but as to which he retains until his death the right to change the enjoyment. *Chase Nat. Bank* v. *United States*, 278 U. S. 327; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *Porter* v. *Commissioner*, 288 U. S. 436. The inclusion in the donee's gross estate of property passing under the exercise of a power of appointment rests upon similar principles. *Whitney* v. *Tax Commission*, 309 U. S. 530; *Helvering* v. *Grinnell*, 294 U. S. 153; *Rogers* v. *Helvering*, No. 66, this Term, decided December 6, 1943. And while *Helvering* v. *Hallock*, 309 U. S. 106, in-

volved a question of statutory construction rather than one of Congressional power, the Court in that case again made it clear that the scope of the federal estate tax law is not to be circumscribed by technicalities of title and that it reaches all property in which the decedent has retained until his death an interest, whether vested or contingent, or some dominion which renders the gift incomplete until death.[15]

"It is as unimportant here as it was in the cases just discussed that there was no "transfer" to the survivor. The question is whether or not the death of the decedent brought into being or ripened for the survivor property rights of such character as to make appropriate the imposition of a death duty. The test is a practical one, to be determined not by labels or descriptive phrases used to describe the wife's interest under community property law (*Morgan* v. *Commissioner*, 309 U. S. 78, 626; *Tyler* v. *United States*, *supra*)

[15] These cases do not, of course, mark the outer limits of Congressional power. There may be included in the measure of the tax gifts which are deemed complete when made such as gifts in contemplation of death (*Milliken* v. *United States*, 283 U. S. 15) and transfers in trust subject to revocation or modification only with the consent of the beneficiary (*Helvering* v. *City Bank Co.*, 296 U. S. 85), at least where statutory provision requiring the inclusion or a similar provision was in effect when the transfer was made. Such cases rest upon the principle of bringing within the scope of the tax to avoid evasion transfers sufficiently akin to testamentary transfers to be classified with them.

but rather by actualities. In terms of the present case, the basic question, therefore, is whether by virtue of the decedent's death the wife acquired substantial rights with respect to her interest in community property which she had not previously enjoyed.

The wife's interest under Louisiana community property law.—Prior to the husband's death the wife's so-called "vested" right consists chiefly of her right to receive one-half of any community property in existence at the dissolution of the community by death or by divorce (for whatever cause), subject to community obligations. Articles 2406, 2409–2413 of the Louisiana Civil Code, Appendix, *infra*.[16] This is a right, not in specific

[16] The court below stated (R. 28) that the wife might, without securing a divorce, and even in the absence of fraud, sue for a dissolution and liquidation of the community partnership and secure the delivery into her own exclusive management and control of her half of the community property whenever her husband proved to be incompetent, a bad manager, or of a reckless and speculative disposition, or whenever his affairs were in such disorder that her property rights were jeopardized. See also *Bender* v. *Pfaff*, *supra*. It should be noted, however, that Article 2425 of the Civil Code (*Appendix*, *infra*) provides merely that the wife may apply for a separation of property when her dowry is in danger owing to his mismanagement or when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims. The provision is primarily designed to preserve her separate estate. See *Jones* v. *Jones*, 119 La. 677; *Darrick* v. *Darcy*, 6 Robinson 342. While it has been held that she might sue him for a separation of property, even though she had no dowry or paraphernal prop-

property, but in a residue. *Tomme* v. *Tomme*, 174 La. 123; *Kelly* v. *Kelly*, 131 La. 1024. The wife has no right during the existence of the community to enjoy or dispose of her half-interest in any community property or income. Each spouse has certain rights which extend to the whole property, but the wife cannot, during the existence of the community, secure any definite part of the community property or income for her own unrestricted use and enjoyment. Indeed, the husband has the sole management of the property and income (Article 2404, Louisiana Civil Code, Appendix, *infra*), and administers it as he pleases without any liability to account to her for its administration. *Frierson* v. *Frierson*, 164 La. 687.

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erty, where he was insolvent and her earnings were needed for the support of the family (*Cavitt* v. *Trotat*, 105 U. S. 751; *Gastamer* v. *Gastamer*, 131 La. 1), we know of no Louisiana case in which it has previously been held that a wife having no separate estate may secure a separation of community property merely because her husband is an incompetent manager or of a speculative nature. Nor in view of the Louisiana cases cited in *Bender* v. *Pfaff*, *supra*, do we believe that this Court intended in that opinion to state a broader rule. And if she can secure a separation of property, she cannot thereby recover anything with respect to community funds which he has already squandered in speculation or in riotous living.

In some of the community property states, though not in Louisiana, the husband and wife may by agreement during marriage overcome the effect of the community property law. In Louisiana the husband and wife may agree prior to marriage or in their marriage contract that the community of acquets and gains shall not exist between them, but cannot by private agreement after marriage set

He may alienate either community real estate or community personal estate without her consent, provided he does so for consideration. Article 2404; see Article 2334. The whole property and not merely one-half is subject to the payment of the community debts incurred by the husband (*Phillips* v. *Phillips*, 160 La. 813; *Marshall* v. *Mullen*, 3 Robinson 328 (S. Ct., La.); *Succession of Curtiss*, 10 La. Ann. 662; *First Nat. Bank of Abbeville* v. *Broussard*, 202 La. 315; *Succession of W. G. Kerley*, 18 La. Ann. 583; *Theus* v. *Smith* (La. App.), decided March 8, 1939 (189 So. 305), and although the court below stated that no portion of the community property could be used to pay his separate debts, the restriction means little, since the term "community debt" includes apparently any obligation incurred by the husband during marriage, including liability for his torts (*Bauer* v. *Albers*, 187 La. 496; *Edwards* v. *Ricks*, 30 La. Ann. 926; *Hawley* v. *Crescent City Bank*,

it aside. Articles 2392 and 2399 of the Louisiana Civil Code, Appendix, *infra*. Louisiana spouses do not have a general power to make contracts with each other and sales and transfers between them except in a few specified instances are void. *Kelly* v. *Kelly*, 131 La. 1024; *Guillot* v. *Guillot*, 141 La. 86, 90; *Marks* v. *Louvenberg*, 143 La. 196. Gifts are at best revocable. Louisiana Civil Code, Article 1749; *Cousin* v. *St. Tammany Bank & Trust Co.*, 146 La. 393; *Succession of Johnson*, (La. App.), decided May 11, 1942 (8 So. 2d 139); *Howard* v. *United States*, 125 F. 2d 986 (C. C. A. 5th).

In some of the other community property states, however, the spouses may contract with each other and the

26 La. Ann. 230; *Kelly* v. *Robertson*, 10 La. Ann. 303).[1] A community debt does not mean a debt incurred for the benefit of both spouses and expenditure of community funds may be made by the husband to gratify any personal desire without any liability to account to the wife. *Frierson* v. *Frierson, supra.*

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status of community or separate property may be changed by agreement. See California Civil Code (Deering, 1941), Sections 158, 159, 160. *Estate of Watkins*, 16 Cal. 2d 793, 797; *United States* v. *Goodyear*, 99 F. 2d 523, 526-527 (C. C. A. 9th); Remington's Revised Statutes of Washington (1932), Section 6894; *State ex rel. Van Moss* v. *Sailors*, 180 Wash. 269; *Seaton* v. *Smith*, 186 Wash. 447; *Snyder* v. *Snyder*, (S. Ct., Wash.) decided March 24, 1943 (135 P. 2d 455); *Estate of Baldwin*, 50 Ariz. 265; 273, and cases cited; *Greenwood* v. *Commissioner*, 134 F. 2d 915 (C. C. A. 9th). New Mexico holds otherwise even though the parties may contract with each other. *McDonald* v. *Lambert*, 43 N. M. 27, 32-36. See also III Vernier, *American Family Laws* (1935), Section 178.

[1] Article 2403 of the Louisiana Civil Code (Appendix, *infra*) provides merely that debts contracted during marriage must be acquitted out of the common fund. But the wife has no authority to contract obligations that are binding on the community property except in exceptional circumstances, whereas the husband has full power to do so. The only restriction is that creditors of the husband, after dissolution of the community, are subordinated to creditors of the community. *Thompson* v. *Vance*, 110 La. 26. And despite the prohibition of Article 2403, the community property has been held liable for the husband's antenuptial debts. *Davis* v. *Compton*, 13 La. Ann. 396. Cf. *Glenn* v. *Elam*, 3 La. Ann. 611.

McKay, *Community Property* (Second Ed.), Section 802, states that the general rule is that community property may be seized and sold on forced sale or execution to

This does not mean that the husband has unrestricted dominion over the community property. He may not give away the community real estate or a substantial part of the community personal estate and if he deliberately defrauds his wife, she has a remedy against the heirs. Article 2404, Appendix, *infra; Bender* v. *Pfaff*, *supra*. The enrichment of his separate estate at the expense of the community may also lead to a reimbursement when the community is dissolved (Article 2408, Appendix, *infra*), though reimbursement is not for the funds thus expended but for the enhancement in value of the property (*Munchow* v. *Munchow*, 136 La. 753). She, too, has certain powers to pledge the credit of the community (*Prendergast* v. *Cassidy*, 8 La. Ann. 96; *Landau* v. *Warwick*, 10 La. Ann. 30; *Gosserand* v. *Montleone*, 159 La. 316; *Wilson* v. *Henderson* (La. App.), decided June 28, 1939 (191 So. 602); *D. H. Holmes Co.* v. *Morris*, 188 La. 431), though her

satisfy a judgment against the husband, whether or not the debt is a community debt. He excepts only the State of Washington, where he states that community debts only may be satisfied out of community property. Although Washington has no statutory provision dealing generally with the question, the rule is as McKay has stated. *Poe* v. *Seaborn*, 282 U. S. 101; *Schramm* v. *Steele*, 97 Wash. 309. But this does not mean all that the rule implies, for the reason that a very liberal view is taken of what constitutes a community debt. See *Henning* v. *Anderson*, 121 Wash. 53; *Kuhn* v. *Groll*, 118 Wash. 285; *In re Levinson*, 1 F. 2d 851 (C. C. A. 9th), certiorari denied, *sub nom. Greene* v. *Booth*, 267 U. S. 598.

power is limited (*Luthy* v. *Philip Werlein Co.*, 163 La. 752). See Leon D. Hubert, Jr., *Effect of Recent Acts on the Incapacities and Disabilities of Married Women in Louisiana*, 8 Tulane Law Review 106. She may also, in certain circumstances, bind the community property by her torts. *Adams* v. *Golson*, 187 La. 363; *Matulich* v. *Crockett* (La. App.), decided November 28, 1938 (184 So. 748). But notwithstanding these restraints on the husband, it is clear that the wife's interest in the community property, during her husband's lifetime, does not embrace, with respect to her half interest, anything close to an exclusive right to enjoy, manage, and dispose of the property; the death of the husband gives to her significant attributes of ownership—the right to sole management, control, enjoyment, and dispositive power.

The test applied. Under *Tyler* v. *United States*, *supra*, and *United States* v. *Jacobs*, *supra*, the congressional power to include in the tax base all property owned in common by the decedent and another depends on whether his or her death results in acquisition by the other of substantial rights of property not previously enjoyed; and the fact that the other previously had a "vested interest" is immaterial. The changes in the rights of Louisiana spouses as to community property which are brought about by the death of the husband, and the substantial attributes of

ownership which for the first time accrue to the surviving wife, are clearly as great as, or greater than, the alterations brought about by the death of the co-owner in these cases. Whatever may be the rights of the wife to secure a separation of property during her husband's lifetime, under the Louisiana decisions, it is plain that they are not so absolute as was the power of the joint tenant in the *Jacobs* case to destroy the tenancy by making a conveyance. Nor may the *Tyler* and *Jacobs* cases be discounted because one of the incidents of the death of one joint tenant or a tenant by the entirety is to give the survivor a power of testamentary disposition not previously enjoyed, whereas the death of the husband in Louisiana does not alter the wife's testamentary power over half of the community property. While succession to the testamentary power was one of the incidents relied on in those opinions, the basis of the decisions is not limited to that circumstance. That was only one of the several rights in the bundle that shifted on the decedent's death. A compensating factor here, with respect to community property, is the succession of the wife to management and control of the community property for the first time on the husband's death and to a right to appropriate its fruits.

The principle, moreover, that the shifting of economic interests at death may furnish a proper occasion for the imposition of an estate tax, is

not limited to cases dealing with property interests created by private conveyance. *Moffitt* v. *Kelly*, 218 U. S. 400, held that a state was not precluded from imposing a succession tax measured by the entire community estate, even though the wife had a vested right in the property which could not be impaired by subsequent legislation.[*] Other federal courts have held that there is no constitutional objection to the inclusion in the husband's gross estate of the value of the wife's statutory interest given in lieu of dower, even though under state law the interest is regarded as being vested in her by virtue of the marriage and the statute, and as not passing to her by descent. *Allen* v. *Henggeler*, 32 F. 2d 69 (C. C. A. 8th), certiorari denied, 280 U. S. 594; *Nyberg, Administratrix* v. *United States*, 66 C. Cls. 153, certiorari denied, 278 U. S. 646. It is to be noted that the Supreme Court of Nebraska has approved the holding in the *Henggeler* case. *In re Estate of Sides*, 119 Neb. 314, 323. To the same effect is *Brock* v. *Commissioner*, 16 B. T. A. 1358.

Finally, the court below sought to distinguish the *Tyler* and *Jacobs* cases on the ground that there the wife contributed nothing either in money

[*] The fact that it was subsequently held that the California wife's interest in community property in 1906 was not a vested interest (*United States* v. *Robbins*, 269 U. S. 315) in no way impairs the authority of the decision in *Moffitt* v. *Kelly*, *supra*, for that case was decided on the assumption that her interest was vested.

or property to the joint tenancy or tenancy by the entirety, whereas in Louisiana "the civil law prevails, and the theory of the civil law is that the acquisition of all property during the marriage is due to the joint or common efforts, labor, industry, economy, and sacrifices of the husband and wife" (R. 27). But plainly Congress is no more bound by the "amiable fiction" of the civil law that a Louisiana wife earns half of her husband's salary then it was by the amiable fiction of the common law, in dealing with tenancies by the entirety, that husband and wife are one person. See *Tyler* v. *United States*, *supra*. Economically the salary is attributable to the personal efforts of the husband, not of the wife. Similarly, the income from the separate property of the husband is economically attributable to him rather than to his wife, despite the fact that the state law chooses to regard that income as something both have earned. The fictional basis of the Louisiana law, in this respect, is underscored by the fact that whenever there is a divorce, for whatever cause, the wife takes half of the residue of the community property. She may not have performed any of her marital duties, but the reward is the same.

Equally important, the result reached in the *Tyler* and *Jacobs* cases was probably not dependent for its constitutional validity upon the proposition that the surviving spouse had contributed nothing to the co-owned property and that the

decedent had furnished everything. The emphasis in these cases is not upon the origin of the tenancy by the entirety or the joint tenancy but upon the rights respecting it once established. Thus, it was held that the full value of the property passing to a survivor under a tenancy by the entirety created prior to the estate tax act of 1916 could be included within the decedent's gross estate. *Third Nat. Bank & Trust Co.* v. *White*, 287 U. S. 577; *Helvering* v. *Bowers*, 303 U. S. 618. The *Jacobs* case itself dealt with a joint tenancy created prior to 1916. And in *Dimock* v. *Corwin* (decided with the *Jacobs* case), which also involved a joint tenancy created prior to 1916, a part of the joint property was contributed from the separate property of the surviving wife. The latter property had been given to her by the husband prior to the creation of the joint tenancy, but was hers to do with as she pleased. The full value of the joint tenancy was nevertheless taxed to the husband's estate, the wife's contribution apparently being considered for its bearing on the construction of the statute rather than on any question of constitutional authority (306 U. S. at pp. 372–373). See *Whitney* v. *Tax Commission*, 309 U. S. 530, 539.

The federal statute requires, as a minimum, that there shall be included within a decedent's gross estate such part of the community property as was subject to his or her power of testamentary

disposition. This provision serves to include one-half of the community property here involved within the decedent's gross estate,[7] and appellees raise no objection on this score. The remaining provision of the federal statute requires that the full value of community property be included within the estate of the spouse first to die, except to the extent that the community property is attributable to the earnings of the surviving spouse or to income from his or her separate property. In this, as presumably in most cases, all of the

[7] In most but not all of the community property states each spouse has the right to dispose of one-half of the community property by will. Nevada has made several changes in its laws dealing with this question. By Section 10 of the Act of March 10, 1873 (Statutes of Nevada (1873), p. 193), it was provided that if the wife died first, the community property belonged to the surviving spouse but if the husband died first, the wife should take one-half and the other half was subject to testamentary disposition of the husband. By the Act of March 27, 1935 (Statutes of Nevada (1935), c. 110, p. 232), it was provided that upon the death of either spouse, the entire community property belonged to the survivor, except that if the husband should have abandoned his wife, one-half would be subject to her testamentary disposition. By the Act of March 26, 1937 (Statutes of Nevada (1937), c. 197, p. 417), the provisions of the Act of March 27, 1935, were repealed. Under the 1937 act the husband was to have the power of testamentary disposition over one-half but the wife was not unless she had been abandoned by her husband. See Sections 3361, 3365, New Compiled Laws of Nevada (1929). In New Mexico also, it appears that the husband, but not the wife, has power of testamentary disposition with respect to community property. New Mexico Statutes (1941) Annotated, Sections 31-108, 31-109. See also *Hernandez v. Becker*, 54 F. 2d 542 (C. C. A. 10th).

community property is attributable to the earnings of the husband. Hence, this provision requires inclusion of the second half of the community property within the decedent's gross estate. It is the inclusion of this second half to which appellees object. Since, as we have seen, the husband's death ripened for the surviving wife substantial property rights which had not previously existed, there is no tenable objection to the inclusion of this portion of the community property under the Fifth Amendment.

Inasmuch as the present case brings into play every provision of the statute and, as applied to the facts here, the statute does not offend the Fifth Amendment, there would seem to be no occasion to discuss its application to other situations not presented by this record. One may complain only of violation of his own constitutional rights, not of those of another. *Heald* v. *District of Columbia*, 259 U. S. 114, 123; *Virginian Ry.* v. *Federation*, 300 U. S. 515, 558.

In any event, however, the death of *either* spouse effects a shift to the other of substantial rights respecting the community property. On the wife's prior death the husband is freed of the fetters deemed substantial in *Bender* v. *Pfaff*, *supra*, although where even half of the property is traceable to the husband's income the share taken by him will not be included in his wife's gross estate. In cases such as the present, only the one-half of the community property will be taxable to the

wife's estate, upon her death, prior to the husband, over which she has the right of testamentary disposition. The inclusion of such half, even where the total property is economically attributable to the survivor, is justified under the cases holding that property passing under the exercise of a power of appointment by will may be included in the donee's estate. *Whitney* v. *Tax Commission*, 309 U. S. 530. See also *Morgan* v. *Commissioner*, 309 U. S. 78, 626; Einstein, *Powers of Appointment and Estate Taxes, II*, 52 Yale L. J. 494, 551 (1943).[20] Prior to the enactment of Section 402 (b) of the Revenue Act of 1942, one-half of the value of the community property was includible in the gross estate of the decedent-wife. Where, as here, the husband's separate property and earnings produce the community property and the wife predeceases him, no substantial change is effected by the 1942 Act.

The uniformity requirement.—There remains only the possible contention that Section 402 (b)

[20] That the wife's power of testamentary disposition over half the community property, possessed by her in all the community property states save New Mexico and Nevada (see Vetnier, *supra*), is a sufficient basis, at least coupled with her other interests, to assess against her estate a tax on the basis of that half of the community property, is also made clear by the decisions that held under the prior law that the husband's estate was taxable on only half the community property. *United States* v. *Goodyear*, 99 F. 2d 523 (C. C. A. 9th); *De Lappe* v. *Commissioner*, 113 F. 2d 48 (C. C. A. 5th). See *Lang* v. *United States*, 304 U. S. 264. See also *New York Trust Co.* v. *Eisner*, 256 U. S. 345.

offends the uniformity requirement of the first paragraph of Article I, Section 8, of the Constitution. The state District Court (R. 13), though not the court below, held the taxing statute invalid under that provision of the Constitution.

There is no merit to this contention. It is well settled that geographic uniformity is all that is required under Article I, Section 8. A tax is uniform when it operates with the same force and effect in every place where the taxable subject is found. *Head Money Cases* (*Edye* v. *Robertson* and *Cunard Steamship Co.* v. *Robertson*), 112 U. S. 580; *Knowlton* v. *Moore*, 178 U. S. 41; *Poe* v. *Seaborn*, 282 U. S. 101; *Crooks* v. *Harrelson*, 282 U. S. 55. The class of taxes known as duties, imposts and excises, to which the rule of uniformity applies, is by nature the least susceptible to the requirement of *inherent* equality and uniformity (*Knowlton* v. *Moore*, *supra*), and no such requirement has been exacted (*Knowlton* v. *Moore*, *supra*; *Billings* v. *United States*, 232 U. S. 261, 282; *Florida* v. *Mellon*, 273 U. S. 12; *Bromley* v. *McCaughn*, 280 U. S. 124, 138–139; *Poe* v. *Seaborn*, *supra*, p. 117; *Crooks* v. *Harrelson*, *supra*). In *Poe* v. *Seaborn*, *supra*, where it was argued that to permit income earned in community property states to be divided between the spouses for federal tax purposes would violate the uniformity requirement, the Court said (pp. 117–118):

> * * * differences of state law, which may bring a person within or without the

> category designated by Congress as taxable, may not be read into the Revenue Act to spell out a lack of uniformity.

Section 402 (b) obviously lays down a uniform federal estate tax rule with respect to community interests wherever they are found. Congress is not prohibited from imposing such a tax by reason of the fact that all of the states do not have such a system or by reason of any supposed advantages that will accrue to citizens of common law jurisdictions to which the statute does not apply. *Poe v. Seaborn, supra.*

Any contention that the common law states will have a tax advantage is somewhat incongruous in view of the fact that the Congressional purpose was to eliminate the tax advantages enjoyed by the community property states. S. Rep. No. 1631, 77th Cong., 2d Sess., p. 231. But if such advantages will accrue, the community property states have it within their power to eliminate them by the amendment of their own statutes. In fact,

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It may be noted that where the wife dies first spouses in community property states still retain substantial estate tax advantage over spouses in common law jurisdictions. For in this situation, as the typical case, the wife's estate will be taxed with respect to one-half of the value of the property acquired during the marriage, leaving the husband's estate to be taxed only with the remaining one-half. In common law states, on the other hand, the entire tax will be borne by the husband's estate and, due to the graduated rates, that tax will be greater than it would have been had the aggregate estate been divided and taxed as two units.

even if they would be required to amend their constitutions to secure for their citizens equality with the citizens of other states in the matter of federal estate taxation, the federal statute would nevertheless satisfy the uniformity clause. *Florida v. Mellon*, 273 U. S. 12.[22]

CONCLUSION

This Court should not accept jurisdiction of this case for the purpose of deciding whether or not

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[22] Some of the community property states originally had the common law system. In Arizona, Chapter XXVII of the Arizona Code (Howell's) adopted by the first territorial legislature on November 10, 1864, contained 32 sections relating to dower. The law of community property was not adopted until 1865, by an act of the second territorial legislature, dated December 3, 1865, Section 10 of which expressly provided that there should no longer be any estate of dower and courtesy allowed. This statute embodied almost verbatim the provisions of the original California community property law of 1850. In Idaho, the first territorial legislature, by a sweeping act, approved June 4, 1864, adopted the common law of England "as the law of the land in the territory," so far as the same was not inconsistent with the provisions of the Constitution and laws of the United States, the organic law of the territory, and the laws of the territory. The community property law, also taken almost verbatim from the original California statute, was first adopted at the fourth session of the territorial legislature by an act approved January 9, 1867. In Nevada, too, the very first act of territorial legislature at its first session was to provide that the common law of England, so far as it was not repugnant to, or inconsistent with the Constitution or laws of the United States or the law of the territory, should be the rule of decision in all courts of the territory. This was in effect, so far as concerns property rights, until the first commu-

Section 402 (b) of the Revenue Act of 1942 is constitutional. In any event, the provision is valid.

Respectfully submitted.

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FEBRUARY 1944.

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nity property law was enacted (Stat. 1864–1865, p. 239). *Darrenberger* v. *Haupt*, 10 Nev. 43; *Lake* v. *Bender*, 18 Nev. 361, 382. In Washington, the common law right of dower and courtesy existed from 1855 to 1869. The right of dower is repeatedly referred to in the laws up to that time and was elaborately provided for at the 1864 session of the territorial legislature by an act, which, like the Arizona statute of 1864, covered 32 sections and was passed on June 30, 1864. A community property act, also in substantially identical language as the original California act, was first adopted by an act approved December 2, 1869. This was displaced by an act approved November 29, 1871. The latter act was in turn displaced by the act of November 14, 1879, which, with amendments, is in effect today.

APPENDIX

Constitution of the United States:

ARTICLE 1, SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * * * *

FIFTH AMENDMENT.—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intan-

gible, wherever situated, except real property situated outside of the United States—

* * * * *

(e) *Joint Interests.*—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

* * * * *

(26 U. S. C., Sec. 811.)

Revenue Act of 1942, c. 619, 56 Stat. 798:

SEC. 402. COMMUNITY INTERESTS.

* * * * *

(b) *General Rule.*—Section 811 (e) (relating to joint interests) is amended as follows:

(1) By striking out "(e) *Joint Interests.*—" and inserting in lieu thereof

"(e) *Joint and Community Interests.*—

"(1) *Joint Interests.*—".

(2) By inserting at the end thereof the following new paragraph:

"(2) *Community Interests.*—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.

* * * * *

(26 U. S. C., Supp. II, Sec. 811.)

Louisiana Civil Code (Dart, 1932):

ART. 915. *Community property—Inheritance and distribution.*—When either husband or wife shall die, leaving neither a father nor mother nor descendants, and without having disposed by last will and testament of his or her share of the com-

munity property, such undisposed of share shall be inherited by the surviving spouse in full ownership. In the event the deceased leave descendants, his or her share in the community estate shall be inherited by such descendants in the manner provided by law. Should the deceased leave no descendants, but a father and mother, or either, then the share of the deceased in the community estate shall be divided in two equal portions, one of which shall go to the father and mother or the survivor of them, and the other portion shall go to the surviving spouse. [As amended, Acts 1910, No. 57; 1916, No. 80; 1920, No. 160.]

ART. 2332. *Community of acquets or gains—Modification or abrogation by agreement.*—The partnership, or community of acquets or gains, needs not be stipulated; it exists by operation of law, in all cases where there is no stipulation to the contrary.

But the parties may modify or limit it; they may even agree that it shall not exist.

ART. 2334. *Separate and common property of spouses.*—The property of married persons is divided into separate and common property.

Separate property is that which either party brings into the marriage, or acquires during the marriage with separate funds, or by inheritance, or by donation made to him or her particularly.

The earnings of the wife when living separate and apart from her husband although not separated by judgment of court, her earnings when carrying on a business, trade, occupation or industry separate from her husband, actions for damages resulting from offenses and quasi offenses and the

property purchased with all funds thus derived, are her separate property.

Actions for damages resulting from offenses and quasi offenses suffered by the husband, living separate and apart from his wife, by reason of fault on her part, sufficient for separation or divorce shall be his separate property.

Common property is that which is acquired by the husband and wife during marriage, in any manner different from that above declared. But when the title to community property stands in the name of the wife, it can not be mortgaged or sold by the husband without her written authority or consent. [As amended, Acts 1912, No. 170; 1920, No. 186.]

ART. 2335. *Separate property of wife—Dotal and paraphernal property.*—The separate property of the wife is divided into dotal and extradotal.

Dotal property is that which the wife brings to the husband to assist him in bearing the expenses of the marriage establishment.

Extradotal property, otherwise called paraphernal property, is that which forms no part of the dowry.

ART. 2336. *Spouses — Donations inter se—Right to receive donations.*—Husband and wife may, by their marriage contract, make reciprocally or one to the other, or receive from other persons, in consideration of their marriage, all kinds of donations, according to the rules and under the modifications prescribed in the title: OF DONATIONS INTER VIVOS AND MORTIS CAUSA.

ART. 2337. *Dowry—Meaning of term.*—By Dowry is meant the effects which the

wife brings to the husband to support the expenses of marriage.

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ART. 2383. *Definition.*—All property which is not declared to be brought in marriage by the wife, or to be given to her in consideration of the marriage or to belong to her at the time of the marriage, is paraphernal.

ART. 2384. *Wife's right to administer.*—The wife has the right to administer personally her paraphernal property, without the assistance of her husband.

ART. 2385. *Wife failing to administer paraphernal property—Management by husband.*—The paraphernal property, which is not administered by the wife separately and alone, is considered to be under the management of the husband.

ART. 2386. *Fruits of paraphernal property—Ownership.*—When the paraphernal property is administered by the husband, or by him and the wife indifferently, the fruits of this property, whether natural, civil, or the result of labor, belong to the conjugal partnership, if there exists a community of gains. If there do not, each party enjoys, as he chooses, that which comes to his hands; but the fruits and revenues, which are existing at the dissolution of the marriage, belong to the owner of the things which produce them. [As amended, Acts 1871, No. 87.]

ART. 2387. *Wife—Assumption of administration of paraphernal property.*—The wife who has left to her husband the administration of her paraphernal property, may afterwards withdraw it from him.

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ART. 2392. *Stipulation against marital partnership.*—Married persons may stipulate that there shall be no partnership between them.

ART. 2399. *Community of acquets and gains—Stipulation against required.*—Every marriage contracted in this State, superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary.

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ART. 2402. *Property forming community—Personal injuries to wife.*—This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase. But damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone; "provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws." [As amended, Acts 1902, No. 68.]

ART. 2403. *Community and individual debts.*—In the same manner, the debts con-

tracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund, whilst the debts of both husband and wife, anterior to the marriage, must be acquitted out of their own personal and individual effects.

ART. 2404. *Husband master of community—Gratuitous and fraudulent conveyances.*—The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

He can make no conveyance inter vivos, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor.

Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactory proving the fraud. [As amended, Acts 1926, No. 96.]

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ART. 2406. *Dissolution of marriage—Division of community.*—The effects which compose the partnership or community of gains, are divided into two equal portions

between the husband and the wife, or between their heirs, at the dissolution of the marriage; and it is the same with respect to the profits arising from the effects which both husband and wife brought reciprocally in marriage, and which have been administered by the husband, or by husband and wife conjointly, although what has been thus brought in marriage, by either the husband or the wife, be more considerable than what has been brought by the other, or even although one of the two did not bring anything at all.

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ART. 2408. *Increase or improvement of separate property during marriage—Division—Unearned increment—Separate property improved at expense of community.*—When the separate property of either the husband or the wife has been increased or improved during the marriage, the other spouse, or his or her heirs, shall be entitled to the reward of one-half of the value of the increase or ameliorations, if it be proved that the increase or ameliorations be the result of the common labor, expenses or industry; but there shall be no reward due, if it be proved that the increase is due only to the ordinary course of things, to the rise in the value of property, or to the chances of trade.

ART. 2409. *Debts contracted during marriage—Liability.*—It is understood that, in the partition of the effects of the partnership or community of gains, both husband and wife are to be equally liable for their share of the debts contracted during the marriage, and not acquitted at the time of its dissolution.

ART. 2410. *Wife or her heirs or assigns—Renunciation of community—Exoneration from debts.*—Both the wife and her heirs or assigns have the privilege of being able to exonerate themselves from the debts contracted during the marriage, by renouncing the partnership or community of gains.

ART. 2411. *Wife renouncing community—Effect.*—The wife, who renounces, loses every sort of right to the effects of the partnership or community of gains.

But she takes back all her effects, whether dotal or extradotal.

ART. 2412. *Wife—Active concern in community — Renunciation prohibited.*—The wife who has taken an active concern in the effects of the community, can not renounce the same.

Acts which are simply administrative or conservatory, do not come, in this article, under the denomination of active concern.

ART. 2413. *Wife—Preservation of power to renounce — Inventory.*—The surviving wife, who wishes to preserve the power of renouncing the community of gains, must make an inventory within the delays and with the formalities prescribed for the beneficiary heir.

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ART. 2425. *Wife's right to petition for separation of property.*—The wife may, during the marriage, petition against the husband for a separation of property, whenever her dowry is in danger, owing to the mismanagement of her husband, or otherwise, or when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims.

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ART. 2427. *Judicial decree essential.*—The wife must petition for the separation of property, and it can only be ordered by a court of justice, after hearing all parties. It can, in no case, be referred to arbitration.

Every voluntary separation of property is null, both as respects third persons and the husband and wife between themselves.

Louisiana Code of Practice (Dart):

ART. 996.65. *Schedule of taxes—Taxable property.*—Upon every inheritance, legacy, or donation or gift made in contemplation of death, to or in favor of a direct descendant, by blood or affinity, ascendant or surviving spouse of decedent, the amount or value of which shall exceed five thousand dollars ($5,000) the tax shall be two (2) percent of the actual value thereof at the time of death on the amount in excess of five thousand dollars ($5,000) up to twenty thousand dollars ($20,000), and three (3) percent of such actual value on the amount in excess of twenty thousand dollars ($20,000).

Upon every inheritance, legacy, or donation or gift made in contemplation of death, to a collateral relation (including brothers or sisters by affinity), the amount or value of which shall exceed one thousand dollars, the tax shall be five (5) percent of the actual value thereof at the time of death, on the amount in excess of one thousand dollars ($1,000) up to twenty thousand dollars ($20,000); and seven (7) percent of such actual value on the amount in excess of twenty thousand dollars ($20,000).

Upon every legacy, or donation or gift made in contemplation of death, to a stranger, the amount or value of which

shall exceed five hundred dollars ($500) the tax shall be five (5) percent of the actual value thereof at the time of death, on the amount in excess of five hundred dollars ($500) up to five thousand dollars ($5,000) and ten (10) percent on the amount in excess of five thousand dollars ($5,000).

Said tax shall be imposed with respect to all property of every nature and kind included or embraced in any inheritance, legacy, or donation or gift made in contemplation of death, including all personal property physically in the state of Louisiana, whether owned or inherited by, or bequeathed, given or donated to, a resident or nonresident, and whether inherited, bequeathed, given or donated to, under the law of this state or of any other state or country; and all personal property owned by residents of the state of Louisiana, wherever situated, unless such property shall be included in the exemptions above set forth.

In the event that any real estate is included in the estate of the decedent and is bona fide mortgaged in an amount in excess of 50 per cent of its value, in computing the equity of value of such estate for the purposes of assessing an inheritance tax, the apparent margin between the appraised value of such realty and the mortgage encumbrance thereon shall be reduced by an amount equal to 20 percent of such encumbrance [Acts 1921 (E. S.), No. 127, § 2].

ART. 996.66. *Manner of taking possession of succession.*—It shall be unlawful for any heir, legatee, or other beneficiary of a donation mortis causa to take or be in possession of any part of the things or property composing the inheritance, legacy, or other

donation mortis causa, or to dispose of the same or any part thereof, until he shall have obtained the authority of the court to that effect, except as hereafter provided in section 17 [Art. 996.80]; and in case he shall so take or be in possession or shall so dispose of such things or property, or any part thereof, he shall no longer have the right of renouncing such inheritance or donation mortis causa, and shall remain personally liable for the tax thereon; but he may, without waiting for authority do such acts as may seem necessary to preserve the property from waste, damage, or loss [Acts 1921 (E. S.), No. 127, § 3].

ART. 996.67. *Duty of executor.*—The executor of the will of a person deceased, or the administrator of his succession, shall, except as hereafter provided in section 17 [Art. 996.80], after payment of his debts, proceed against the tax collector and all the heirs and legatees of the deceased summarily, by rule before the court which has jurisdiction of the succession, to fix the amount of tax due by each heir or legatee, and on trial thereof the court shall render judgment for the same against each heir or legatee, with interest and costs, as hereinafter provided [Acts 1921 (E. S.), No. 127, § 4].

ART. 996.68. *Amount of taxes to be deducted by executor or administrator.*—The executor or administrator shall thereupon pay to the tax collector the amount of tax, with interest and costs, so fixed, on each inheritance, legacy or donation, out of the funds comprised therein, if sufficient. Should there not be sufficient funds, the court shall, on the application of the heir or legatee, grant an order for the sale of the

property composing such inheritance, legacy or donation, or so much thereof as may be necessary, for the purpose of paying such judgment. If the same be not paid by the heir or legatee, or an order of sale be not granted, as above provided within thirty days after the date of the judgment, the court shall, on the application of the executor or administrator, grant an order of sale for the said purpose, as above provided, and the executor or administrator shall pay the said judgment out of the proceeds of the sale.

Such sale shall be made in such manner, and on such terms and conditions as the court shall prescribe, and the expense thereof shall be borne by the heir or legatee [Acts 1921 (E. S.), No. 127, § 5].

ART. 996.69. *Delivery of inheritance prohibited until tax paid—Liability of executor or administrator.*—No executor or administrator shall deliver any inheritance, or legacy until the tax thereon shall be fixed and paid, as herein provided; otherwise he, together with his surety, shall be personally liable for said tax, with interest and cost. And no executor or administrator shall be discharged until it is shown that all taxes under this act, due by the heirs and legatees, have been paid, or until it is judicially determined by the process herein provided that no tax is due [Acts 1921 (E. S.), No. 127, § 6].

ART. 996.70. *Administration not ordered by court—Duty of heir or universal legatee—Legatees and donees—Fixing and collection of tax.*—In all cases in which an administration is not ordered by the court, the legal instituted heir, or universal or residuary legatee, or any other interested

person, except as provided in section 17 [Art. 996.80], shall within six months after the death of the decedent, or should there be a will, within the same time after the discovery of the same, present to the court a detailed descriptive list, sworn to and subscribed by him, of all items of property contained in and composing the estate of the decedent, and therein shall state the actual cash value of each such item at the time of the death of the decedent, and service thereof shall be made on the tax collector who shall have the right to traverse the same. Should the deceased have made special or particular legacies or donations mortis causa, the legatee shall also be served, and after summarily hearing the parties the court shall fix the amount of tax due as aforesaid by each such heir or legatee, and shall render judgment therefore with interest and costs, against each of them. The various clerks and deputy clerks of the district courts of the state of Louisiana, whether the district judges be present or absent from the parish, are hereby authorized to sign rules against legatees and against the sheriffs and ex officio tax collectors of the various parishes, directing the said sheriffs and ex officio tax collectors to show cause at such time, but not less than five days, as may be fixed in said rule, why the inheritance tax, if any, should not be fixed by the court as prayed for, and why heirs and other beneficiaries should not be sent into possession of property, acquired by inheritance or donations mortis causa, upon the payment of the inheritance tax as fixed, or without the payment of inheritance taxes, where none is due, as the case may be. In cases where such rules are not contested, the various district judges are hereby au-

thorized to pass upon such rules and sign judgments thereon in open court or in chambers, in term time or in vacation, and either within or without their districts [Acts 1921 (E. S.), No. 127, § 7; 1922, No. 44, § 1].

ART. 996.71. *Payment of tax by heir or universal legatee.*—In the same manner as provided in section 5 [Art. 996.68], the heir or universal or residuary legatee shall thereupon pay or take measures for the payment of the tax due on all special or particular legacies or donations [Acts 1921 (E. S.), No. 127, § 8].

ART. 996.72. *Property may be sold to pay taxes.*—The heir or universal residuary legatee may likewise obtain an order for the sale of the property of his inheritance or legacy, or part thereof, for the purpose of paying the tax thereon. But if such tax be not paid, or such order of sale be not made within thirty days after the date of the judgment fixing the amount of the tax a similar order for the same purpose shall be granted on the application of the tax collector, and thereunder any property forming part of the inheritance or legacy may be sold, and the proceeds thereof shall be applied to the payment of the tax with interest and costs [Acts 1921 (E. S.), No. 127, § 9].

ART. 996.73. *Duty of heir to see that tax is paid.*—The heir or residuary or universal legatee shall not deliver any legacy until the tax thereon shall have been fixed and paid; otherwise he shall be personally liable for the said tax, with interest and costs [Acts 1921 (E. S.), No. 127, § 10].

ART. 996.74. *Succession remaining unopened—Duty of court—Search for will.*—If during the six months next following the

death of any person leaving property, movable or immovable, within this state, an administration of his succession be not applied for, or his legal or instituted heir or universal or residuary legatee do not apply to the court to be placed in possession thereof, as herein provided, the court shall ex parte and on the application of the tax collector grant an order directing that a search be made for the will of the deceased by a notary public, and in aid of the same order that all persons having in their possession or control any books, papers or documents of the deceased or any bank-box, safe deposit vault or other receptacle likely or designed to contain the same, shall open such receptacle and exhibit the contents thereof, as well as all other books, papers, and documents of the deceased, to the said notary [Acts 1921 (E. S.), No. 127, § 11].

ART. 996.75. *Will found—Appointment of executor by court.*—Should the said notary find any document appearing to be the will of the deceased, he shall take possession of the same and produce it in court; and on application of the tax collector, or of any party in interest, the court shall proceed to the probate thereof, as now provided by law. If an executor be therein appointed, the person named shall be notified, and if he do not within ten days after notification accept the appointment, and if within the ten days next following this delay no person entitled to be appointed dative testamentary executor shall apply for the appointment, then the public administrator in the parish of Orleans, and in the other parishes the tax collector, shall be appointed dative testamentary executor of the said decedent, and the administration of his succession shall proceed as herein directed and accord-

ing to existing law [Acts 1921 (E. S.), No. 127, § 12].

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ART. 996.78. *Right of creditors preserved.*—Nothing contained in this act shall affect the rights of creditors of persons deceased or the rights of the creditors of the heirs or legatees of such persons, as established by the general law [Acts 1921 (E. S.), No. 127, § 15].

ART. 996.79. *Legacy indivisible—Liability of property for tax.*—Each inheritance or legacy is indivisible, and must be accepted or renounced for the whole; and the heir or legatee shall not be entitled to be placed in possession of the same, and shall be without right or capacity to alienate any part thereof, until the tax on the whole shall have been fixed and paid, or until it shall have been judicially determined, in the manner herein provided, that no part of the same is subject to the tax imposed by this act; provided, that where the heir or legatee has made a transfer of the property inherited by or bequeathed to him, the transferee, or any one holding under him, may pay the tax herein levied to the officer authorized to receive the same, together with such interest and penalties as may be due thereon at the time of payment, and upon such payment his title to the property shall become, in all respects, as valid as if the said tax had been paid by the said heir or legatee, and all amounts so paid, together with attorney's fees of ten percent thereon, may be recovered from the person originally liable therefor, in any court of competent jurisdiction [Acts 1921 (E. S.), No. 127, § 16].

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ART. 996.82. *Jurisdiction of proceedings.*—The district court of the last domicil of the deceased, and in the parish of Orleans the civil district court, shall have original jurisdiction to hear and determine all the proceedings provided by this act. In the case of a nonresident decedent, the district court, or civil district court, of any parish in which he left property, movable or immovable, shall exercise such jurisdiction, and the court in which such proceedings shall be first begun shall have exclusive original jurisdiction thereof [Acts 1921 (E. S.), No. 127, § 19].

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ART. 996.87. *Interest on unpaid taxes.*—Taxes hereby levied shall bear interest at the rate of one per cent per month, beginning six months after the death of the decedent, and two per cent per month, beginning twelve months after the death of decedent, saving to any heir, legatee, or donee the right to stop the running of interest against him by paying the amount of his tax with accrued interest, estimated or ascertained, or by tendering the same to the tax collector in the manner prescribed by the general law; provided, however, that in cases in which the settlement of the succession is bona fide contested, such interest shall be remitted; so also when it shall be shown to the satisfaction of the tax collector that the beneficiary was ignorant of the inheritance [Acts 1921 (E. S.), No. 127, § 24].

ART. 996.88. *Costs—Liability of succession—Application of act.*—The costs of all the proceedings under this act shall be borne by the mass of the succession; provided, that in cases in which it seems to

him equitable to do so the judge shall have the power to apportion the costs among the several parties, or allow any party to retain his costs out of any sum found to be due by him for tax thereunder. The provisions of this act shall apply to all successions opened by death subsequent to the date the act shall become effective; and successions opened prior thereto shall be subject to taxation under the laws in force at the time they were opened, except as otherwise provided in section 18 (Art. 996.81) of this act. [Acts 1921 (E. S.), No. 127, § 25].

ART. 996.89. *Transfer tax on estates subject to federal tax.*—There is hereby levied, in addition to the inheritance tax as now provided by Act 127 of 1921, as amended by Act 44 of 1922, an estate transfer tax upon all estates which are subject to taxation under the Federal Revenue Act of 1926 [Acts 1932, No. 119, § 1].

ART. 996.90. *State to receive tax in certain cases.*—Whenever the aggregate amount of all inheritance, succession, legacy and estate taxes actually paid to the several states of the United States in respect to any property owned by such decedent shall be less than eighty per cent (80%) of the estate tax payable to the United States under the provisions of the said Federal Revenue Act of 1926, but not otherwise, the difference between said amount and said eighty per cent (80%) shall be paid to the state of Louisiana [Acts 1932, No. 119, § 2].

ART. 996.91. *Regulation and collection of taxes.*—The provisions of Act 127 of 1921 as amended by Act 44 of 1922, in so far as

applicable shall regulate the proceedings to fix the amount of the tax hereby levied and the manner in which same shall be collected [Acts 1932, No. 119, § 3].

ART. 996.92. *Intent and purpose of act.*—It is hereby declared to be the intent and purpose of this act to obtain for this state the benefit of the credit allowed under the provisions of Title III, section three hundred and one, subsection (b), of the Federal Revenue Act of nineteen hundred twenty-six to the extent that this state may be entitled by the provisions of said act, by imposing additional taxes, and the same shall be liberally construed to effect this purpose [Acts 1932, No. 119, § 4].

ART. 996.93. *Estates to which this act applies.*—The provisions of this act shall apply to all estates not fully distributed and now in process of settlement, where the date of death was subsequent to February twenty-six, nineteen hundred twenty-six; provided there is at the time this act goes into effect a sufficient amount still due the United States Government under said Federal Revenue Act of 1926 from which to make the deduction contemplated by section 3 [Art. 996.91] hereof [Acts 1932, No. 119, § 5].

ART. 996.94. *Constitutionality, provisions severable.*—If any section or portion of this act be finally held to be unconstitutional by a court of competent jurisdiction such decision shall not invalidate the portions unaffected thereby [Acts 1932, No. 119, § 6].

ART. 996.95. *Prescription on recovery of tax.*—All actions for the recovery of inheritance taxes due the state shall prescribe by the lapse of three years, against purchasers, and other third persons in good faith, and

by the lapse of five years against the heirs of any deceased persons, starting from the date of the opening of the succession of said deceased person in one of the courts of this state [Acts 1924, No. 82, § 1].

U. S. GOVERNMENT PRINTING OFFICE: 1944